Basic Rights of Internally Displaced Persons:
Observing the Case-Law of the European Court of Human
Rights and the Inter-American Court of Human Rights

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Introduction

“........ The State should be the best guarantor of human rights. It is the State that the international community should principally entrust with ensuring the protection of individuals. However, the issue of international action must be raised when States prove unworthy of this task, ........ and, when – far from being protectors of individuals – they become tormentors ...... . In these circumstances, the international community must take over from the States that fail to fulfill their obligations. ....“.

The speech is important for the purpose of the present paper, since it gives accent to the point which is substantial to this study. It follows, that, above all, the state is bound to secure the basic human rights standards within its jurisdiction. The failure of the state to retain human rights and fundamental freedoms may give rise to an infraction of universal and regional human rights Conventions. To this effect, the procedure of individual complaint may be discussed as a crucial guarantor for human rights international protection. The same approach has to be made in relation to marginalized group - internally displaced persons who are traditionally excluded from protection or recognition by the state.

With this objective in view, the paper focuses on the human rights situation of internally displaced persons analyzing the composition of legal mechanisms for the safeguard the fundamental rights of these category of people at international panel. Specifically, the paper seeks to identify the ways in which the European Court of Human Rights and the Inter-American Court of Human Rights make regard to concerns of IDP’s in order to

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secure their rights guaranteed under the respective international Conventions relating to human rights protection.

The present paper is a result of in-depth study based upon the sources of secondary researches. The sources which have been applied are the following: books, newspapers, manuals, internet databases, political speeches, etc.

To address the problems mentioned above, the study will analyze the different and to some extent similar attitudes and frame of reference of the European Court of Human Rights and the Inter-American Court of Human Rights to response the needs of IDPs and the developments that served as the ground to such kind of decisions on human rights issues of IDPs.

Following this aim, the first chapter of the paper is designed to present the international legal framework for protection of internally displaced persons, and thus it concerns prehistory of creation of the category of „internally displaced person“, including the overview of various drafts of a definition of an IDP from a variety international and regional agencies, some exclusions in the legal definition of an IDP, as well as the roots and circumstances that may cause forced displacement of individuals within the state borders.

The next chapter addresses the issues in the sense of effective protection of IDPs under the International Human Rights Law, particularly, consideration will be given to the specific cases examined by the European Court of Human Rights and the Inter-American Court of Human Rights in relation to internally displaced persons. An attention has to be drawn to the particular civil and political, economic, social and cultural rights that are subject to violation in line of analyzing the case-law of the Courts and, therefore, to the international law responses to which the IDPs may be exposed.
Chapter 1. Who are the Internally Displaced Persons?

Persons who are displaced from their homes, but who are within their own country - internally displaced persons frame the marginalized group of individuals exposed to human rights abuse emerging from and as a consequence of their forced displacement. Public attention has been drawn to IDPs as they differ from other people in movement in fact because of the coercion that encourages their displacement without crossing the borders of the national state.\(^2\)

Over the decades, a significant number of armed conflicts both of international and non-international nature supported by the crisis of national identity have been one of the main reasons for coercive internal displacement followed by massive violations of fundamental human rights and freedoms, serious civil disorder and involved even in „ethnic cleansing“ and genocide against humanity.\(^3\)

With a glance to some causes of armed conflicts, race, religion, or culture are not in themselves the source of conflict. The UN Secretary-General’s Representative, Francis Deng pointed out to this account: „It is never the mere differences of identity based on ethnic grounds that generate conflict, but the consequences of those differences in sharing power and the related distribution of resources and opportunities ...... The role of political leadership at all levels, from local to national, is pivotal“.\(^4\)

The role of political authority is vitally important to the extent to provide effective protection and assistance to internally displaced persons the distinctive needs of whose

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arise out of the causes mentioned above, like serious violations of human rights. To the contrary, the national governments or *de facto* authorities are powerless or undesirous to response adequately to the needs of the internally displaced. Additionally, the valuable right of internally displaced persons to be protected from human rights abuses under the International law is a matter rather political and, therefore is dealt with small efforts from the standpoint of the society. As against to the situation of refugees, who generally are entitled to receive humanitarian aid and protection from the state of refuge which takes responsibility to satisfy their basic concerns, the problems arise if physical protection and humanitarian assistance is to be delivered to the Internally displaced or the persons facing the same risk due to the absence of consent of the ruling authority, either legitimate or *de facto*.

In a general sense, forced displacement is caused by violations of human rights as well as by the breach of Humanitarian law. One can identify the specific regulations of IHL which primarily concern the prohibition of forced displacement. Conventionally, civilian population even in time of internal armed conflict are protected against forced displacement unless it is required and justified for the military necessity. Although, subject to compulsive movement civilian population are entitled to receive under satisfactory conditions shelter, hygiene, health, safety and nutrition.

David A. Korn in his book makes points to some distinctive characteristics of internal displacement listing the category of individuals who merely falls under the classification of IDPs. According to his analysis, as a result of ethnic armed conflicts in particular, internally displaced persons may become “....... both rural and urban dwellers as well as persons of widely varying economic status and educational background......”. In addition, observation results explicitly illustrate that specifically women and children are *par

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6 Article 17, PA to the Geneva Conventions of 12 August, 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June, 1977.
excellence amenable to forced displacement alongside with other kind of rigorous human rights violations. Furthermore, they may indeed undergo severe sufferings as long as are in particular unprotected as meanwhile men are engaged in military hostilities at the risk of life and health. Women are often assaulted with no respect to their dignity and honour, that may usually happen over the period of armed conflict regardless of guaranteeing provisions of the Fourth Geneva Convention, which secures the rights of the protected persons in time of war:

“...... Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault“.

As mentioned above, internally displaced children either depend on parents or adults suffer at most. As a result of forced displacement children often are seperated from their families. As far as an armed conflict is at stake, children may be forced to take an active part into the fighting ranks of one side or another. During the period of forced displacement, in most cases, children are precluded to have access to adequate health care or education.

IDPs during their displacement on numerous occasions have to live in quite different situations. Internally displaced persons usually live in small communities or family groups unless they are settled in camps which may rarely happen. To avoid to be forced to settle in camps, IDPs try to find ways to return to their homes assuming that it is safe to do so, although the process of return lasts for a considerable period and thus can also subject them to serious human rights violations.

It is of particular interest to note, that it can be distinguished several important areas helpful for finding the reasons of specific vulnerability of internally displaced persons. The first unique feature which had originally served as a ground for compulsory fleeing

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homes by a large number of people is that they are members of some identifiable group, likewise, religious, linguistic or ethnic minority group as a result of discriminatory treatment on the part of authorities or other ethnic group. The outcomes of forced movement is expressed in the separation from the community of origin being deprived possessions, employment, status and relatives. Undergoing coercive fleeing, IDPs may face problems to prove their identities and to be restored entirely in their rights, such as, to have access to possessions, to enjoy the right of freedom to movement, etc.

Moreover, a special attention has to be drawn to internally displaced persons being in the process of return to the places of their origin and re-integration for the threat that they may run against numerous problems on the way of rebuilding the normal lifestyle.\(^9\)

Accordingly, the category of the internally displaced is object for the discussion in view of both the International Human Rights Law and the Humanitarian Law on account of the real danger, that they may be exposed to severe human rights abuses from the moment of forced displacement until the completion of the long processes of their return and rehabilitation. For the purpose of elimination of these practices, IDPs shall have advantage to be provided by the effective protection on part of the states and human rights activist organizations and shall have an overall access to recognized human rights protection instruments.

\(\text{a) Definition of the Internally Displaced Persons}\)

The definition of “internally displaced person“ has not been embodied in a universally binding document. For this purpose, there were elaborated numerous of draft explanations with regard the concept of internally displaced persons.

At the outset, regard must be made to the general definition of the expression – displaced person, which at first obtained its interpretation and significance in the General Assembly

Resolution 3454 (XXX) of 9 December 1975. However, the definition applied not only to the internally displaced but also to persons who crossed the borders of home country for reasons of civil strife, etc., who are not refugees according to the statutory definition under 1951 Refugee Convention but are in a similar situation like refugees – *externally displaced persons*. Nevertheless, the term – *displaced person* merely was employed to refer the category of *internally displaced persons* in terms of other respective Resolutions of the General Assembly. As a result, the UN High Commissioner of Human Rights extended its activities and covered the category of displaced persons as well alongside with refugees. The High Commissioner made reference in his statement to the Economic and Social Council at 1976 Sixty-First Session to the boundaries of its humanitarian activities:

„There was no problem when the persons concerned were groups of refugees coming within the terms of the UNHCR statute. In other cases the beneficiaries must be in a position analogous to that of refugees (persons displaced for reasons beyond their control, following events or circumstances attributable to man-made disasters. Such situations were often the result of international conflicts, civil war, general political and social instability, etc.).“

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11 „The essential importance of the High Commissioner’s action to provide international protection to refugees and to promote durable and speedy solutions through voluntary repatriation or return and subsequent assistance in rehabilitation, in consultation with the countries concerned, integration in countries of asylum or settlement in other countries of refugees and displaced persons of concern to the High Commissioner”, General Assembly Resolution 35/41 of 25 November 1980.

12 Resolution 2958 (XXVII) of the General Assembly of 12 December 1972 on Assistance to Sudanese Refugees returning from abroad.
In addition, in one of the more recent resolutions the General Assembly reiterated the need to provide due assistance to refugees and displaced persons, whereas the latter category was mentioned solely in the context of *Internally* displaced persons.\textsuperscript{13}

To summarize, up to 1976, the concept „*displaced persons*“ was given an unclear interpretation, although it, particularly, encompassed and primarily referred to the term of *internally displaced persons*.\textsuperscript{14}

A widely used working definition of IDPs was expressed by Secretary General Boutros-Ghali in the UN Commission on Human Rights report 1992, where the internally displaced were defined as follows:

„Persons who have been forced to flee their homes suddenly or unexpectedly in large numbers, as a result of armed conflict, internal strife, systematic violations of human rights or natural or man-made disasters, and who are within the territory of their own country.”\textsuperscript{15}

However, this working definition presented to be no absolute explanation of the real background on the causes of internal displacement on account of the expression of „fleeing suddenly or unexpectedly“. The contention is that, generally, forcible movement is not necessary to be originated in *sudden or unexpect* form, to the contrary, it may emerg as a result of long term conflict or systematic human rights violations exercised on part of the authoritarian government, in particular. The cases of Bosnian Muslims forced to flee from Bania Luka and hundreds of thousands expelled under the regime of Saddam Hussein are the clear expression of the logic followed above.\textsuperscript{16}

\textsuperscript{13} Resolution A/RES/50/152 of the General Assembly of 21 December 1995.


\textsuperscript{16} Exodus within Borders, An Introduction to the Crisis of Internal Displacement, supra note 3, p. 11-18. 1998.
Another part of this expression which gives rise to concern is about a required quantity of individuals in order to consider them internally displaced persons. The following indication „persons who have been forced to flee .... in large numbers .... „ cause an ambiguity in identification of those who may fall under the definition of IDPs, since in each certain situation provoking the forced displacement the number of internally displaced persons varies depending on the circumstances made them flee from the places of habitual residence. In other words, the term „large number“ is subjective notion and may differ in all situations of forced expulsion. So far, this definition does not exhaustively meets the requirements of the people who may subject to forced displacement for the variety of reasons.

Another sample of the definition of *internally displaced persons* was also proposed by the International Organization for Migration (IOM), in particular:

„The expression „internally displaced persons“ generally refers to persons who, as a result of armed conflict, internal strife, systematic violations of human rights or natural or man-made disasters, have been forced to flee their homes, suddenly or unexpectedly, and in large numbers (mass movements), and who are within the territory of their country. Internally displaced persons also include returnees who, having fled to another country, subsequently return to their own country but are unable to return to their original place of residence“.17 Without defining notion of IDPs the concerns of this category of people and the necessity to carry out effective measures for their protection were also illustrated in Cartagena Declaration, which was adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, held at Cartagena, Colombia in 1984.18

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17 IOM „Internally displaced persons“, Contribution of the IOM to the 3 February 1993 meeting of the United Nations Inter-Agency Standing Committee (IASC).

18 „9. To express its concern at the situation of displaced persons within their own countries. In this connection, the Colloquium calls on national authorities and the competent international organizations to offer protection and assistance to those persons and to help relieve the hardship which many of them face“, Article 9 of the Cartagena Declaration as of 1984.
Tu sum up, regional definitions of internally displaced persons comprehend variety of outstanding characteristics causing their displacement and, therefore, suffer them to human rights abuses except for soft law status of these instruments creating limited possibility for their implementation.¹⁹

The final concept definition of IDPs found its expression in the first document of international standards introduced into the United Nations Commission on Human Rights in April, 1998. The working team composed of eleven international lawyers²⁰ presented the Guiding Principles on Internal Displacement which stipulates the rights of internally displaced persons alongside with the related obligations of each sovereign state or other belligerent group covering the whole developing chain of displacement: the period before and during displacement as well as the procedures relative to the return and reintegration of IDPs.

The absolute necessity to create such an instrument was brought about the concerns and excessive needs of IDPs which have not been adequately addressed by the governments unwilling or unable to duly respect the fundamental rights of internally displaced persons. As a result, in 1998, the UN Special Representative on Internal Displacement, Francis M. Deng, submitted the Guiding Principles on Internal Displacement giving the following definition of IDPs:

„Persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or


²⁰ Experts gathered from academia, UN and ICRC, among others, Jean-Francois Durieux, Robert Goldman (Special Rapporteur on IDP’s for the Inter-American Commission on Human Rights), Francis Deng, Roberta Cohen as well as other specialists from different geographic regions.
natural or human-made disasters, and who have not crossed an internationally recognized State border”

It is worthy of remark, that the Guiding Principles enshrines the definition which is to be considered the broadest descriptive stipulation of the classification of internally displaced persons. It refers to the following different situations: tensions and disturbances regulated by International human rights law, non-international and international armed conflicts generally covered by humanitarian law, and natural and human-made disasters mentioning the cases when state authorities address these disasters in a discriminative manner with regard to certain ethnical minority group. The key elements of the given definition of internal displacement are the forced movement within the borders of the state.

However, according to some authors, the definition deserves some criticism as far as it does not relate to the persons who were forced to migrate from their homes for economic reasons effecting in huge violation of their economic rights. Nonetheless, the definition put IDPs in the centre of extreme attention and concern to the international community and made an important contribution to facilitate the activities of governments and international and regional human rights organizations in the passage of protection of internally displaced persons. Although not a binding document - a soft law, the Guiding Principles on Internal Displacement has become a universally recognizable and widely applied legal document directly addressed to international community as a whole.

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b) The Internally Displaced: Where and Why?

“*A world in which the privileged among nations ignore the plight of the unfortunate can be neither prosperous nor safe for anyone*.\(^{23}\)

Most of the world’s 20 million to 26 million people have experienced brutalities of coercive displacement, notably, by reason of civil wars. The main cause of large scale civil wars is crisis of national identity. Many countries after declaring their independence from colonialism regimes or dictatorships have faced the cruel realness of ethnic disturbances actively supported by direct or indirect intervention of third party.

Only in African countries, such as, Sudan, Angola, Liberia, Rwanda, Mozambique, Ethiopia and Somalia nearly 10 million people became internally displaced. Since Sudan proclaimed its independence in 1956, civil war harassed the country time after time bringing over 4 million internally displaced persons. The civil war in Angola began after the end of the strike for independence from Portugal in 1975 and lasted until 1991, which gave rise to more than a million internally displaced persons. Likewise, the civil wars have left hundreds of thousands internally displaced in Liberia, Rwanda etc. To sum up, throughout Africa region native population suffered from forced displacement in the issue of inter-ethnic conflicts between different tribes in those countries.

The armed conflicts in the Caucasus region between Armenians and Azerbaijans, in Georgia, and in Chechnya brought more than 1 million resettled people. The wars mainly occurred after the break-up of the Soviet Union living the unsettled disputes regarding the territories of the participant states to the conflicts.

Some civil wars may characterised as being religious conflicts. Specifically, in India approximately 250,000 persons have left internally displaced as a result of the conflict between government and Muslim separatists in Kashmir.

Ethnic conflict intervened in 1995 on the territory of former Yugoslavia led to the ethnic cleansing of minority population, in particular. Consequently, in Bosnia and Herzegovina

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\(^{23}\) supra note 3. p. 33.
1 million people remain displaced and more than 200,000 – in Croatia. As a result of conflict in Kosovo region, more than 300,000 people were subject to forced displacement. Most of the conflicts being the cause of the coercive displacement are still unsettled. Eventually, a large number of internally displaced persons remain outside of the places of permanent residence, and being resettled IDPs usually suffer not to having adequate living conditions. In addition, for years internally displaced persons have not been granted a satisfactory attention from international community, which led definitly to long-drawn unsolution of their return to permanent living places.\textsuperscript{24}

\textbf{c) Internally Displaced Persons As a Result of Natural Disasters}

An increased emphasis must be drawn with respect to people involuntary displaced as a result of natural disasters, such as earthquakes, tsunamis, hurricanes or flooding.\textsuperscript{25} The Representative of the UN Secretary-General on the human rights of internally displaced persons, Walter Kälin has specified several natural hazards causing displacement: a) increased hydro-meteorological disasters such as hurricanes, flooding or mudslides; b) gradual environmental degradation and slow onset disasters, such as desertification, sinking of coastal zones, or increased salinization of groundwater and soil; c) the „sinking“ of small island States; d) forced relocation of people from high-risk zones; and e) violence and armed conflict triggered by the increasing scarcity of necessary resources such as water or inhabitable land.\textsuperscript{26} The Representative further concluded that the Guiding Principles should be considered as fully applicable in cases of such natural hazards followed by forced displacement of persons; although he pointed out that the document

\textsuperscript{24} supra note 3, p. 19-33.

\textsuperscript{25} 2004 Tsunami in South-East of Asia, the 2005 Kashmir earthquake, Hurricane Katrina in Gulf region of the United States in 2005.

does not infer measures to perceive the differences between coercive and voluntary displacement resulted from deterioration of economic conditions as well as slow-onset disasters.

IDPs displaced as a consequence of natural disasters face the same challenges as displaced persons who avoid the effects of armed conflicts and while waiting for an effective and appropriate attention from the side of state authority may become the victims of multiple human rights abuses.

Displaced persons affected from natural disasters shall enjoy the basic fundamental rights which were divided into four categories:

“(a) rights related to physical security and integrity (e.g. protection of the right to life and the right to be free from assault, rape, arbitrary detention, kidnapping, ....); (b) rights related to the basic necessities of life (e.g. the rights to food, drinking water, shelter, adequate clothing, adequate health services, and sanitation); (c) rights related to other economic, social and cultural protection needs (e.g. the right to have access to education and work as well as to receive restitution or compensation for lost property), and (d) rights related to other civil and political protection needs (e.g. the rights to religious freedom and freedom of speech, personal documentation, political participation, access to courts, and freedom from discrimination)”.27 The Operational Guidelines is supplement to the main human rights standards enshrined in relevant regional human rights conventions as well as to the Guiding Principles on Internal Displacement, the Sphere Humanitarian Charter and Minimum Standards in Disaster Response, the IFRC Code of Conduct28 and the Inter-Agency Standing Committee (IASC) IDP Policy.29

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From the point of view of population replacement it is worth to mention the increasing frequency of natural hazards which is an effect of recently developed global warming processes.\(^{30}\) Therefore, in order to contest the potential risk of population movements attempts shall be made on part of governmental bodies as well as humanitarian and other actors to be efficient to wrest down the threatening situations.

d) **A Legal Framework for Protecting the Internally Displaced**

The Guiding Principles on Internal Displacement in general focuses on human rights and fundamental freedoms of IDPs which may most likely be violated in the course of occurring those factors being the major roots causing the forced displacement of the population within their own country. However the result proclaims the primar obligation of the states to provide an overall and freely enjoyment of the rights and freedoms to IDPs in non-discriminative manner.\(^{31}\)

The second section of the Guiding Principles relating to protection from displacement provides an advanced description of the conditions for prohibition of arbitrary displacement in the broader sense. Regardless of the similar definitions prescribed in other international human rights instruments, such as, the one stipulated in the Protocol Additional II to Geneva Conventions relating to the Protection of Victims to the Non-International Armed Conflicts,\(^{32}\) the definition makes reference imperatively only to the situation of armed conflict as the forbidden condition entailing coercive displacement of

\(^{29}\) Inter-Agency Standing Committee, Implementing the Collaborative Response to Situations of Internal Displacement, Guidance for UN Humanitarian and/or Resident Coordinators and Country Teams, September 2004.


\(^{31}\) „1. Internally displaced persons shall enjoy, in full equality, the same rights and freedoms under international and domestic law as do other persons in their country, They shall not be discriminated against in the enjoyment any rights and freedoms on the ground that they are internally displaced“, Section I, General principles (Principle 1) of Guiding Principles on Internal Displacement.

\(^{32}\) See, *supra* note 6.
individuals. Meanwhile, the principles enshrined in the UN document categorizes and therewith banning all possible situations which may provoke forced displacement. Particularly, there is an indication on interdiction of displacement „when it is based on policies of apartheid, ‘ethnic cleansing’ or similar practices aimed at or resulting in altering the ethnic, religious or racial composition of the affected population“, or in virtue of „cases of large-scale development projects, which are not justified by compelling and overriding public interests“, etc. Furthermore, the Guiding Principles oblige the authorities concerned to take all measures in order to avoid or at least to minimize the forced displacement and its adverse effects. The principles on protection from coercive displacement were elaborated as a result of in-depth study and which, thereafter, was introduced by the Representative of the Secretary-General to the Commission on Human Rights in 1998.

The Principles further encompass the step-by-step compulsory functions to be employed by the state authority in favour of those people who have been affected by the unavoidable process of forced displacement, such as, the obligations to provide the displaced individuals with the full information about the reasons and procedures for their displacement, with the right to effective remedy in order the decisions relating to displacement matters to be reviewed by appropriate judicial authorities, etc.

Besides, women and children are specifically protected under the relevant provisions set forth in the Guiding Principles; for instance, some principles may primarily refer this especially unprotected category of the internally displaced, as they provide protection from any kind of cruel treatment to person’s dignity and physical integrity, including rape, forced prostitution, and any form of indecent assault.

In addition, special attention is made to participation of women in planning and distribution of food and potable water, appropriate clothing, medical services and sanitation, as well as to the health needs of women, including access to female health care providers and services, such as reproductive health care.

33 See, Principle 6, Para. 2 of Guiding Principles on Internal Displacement.
Thereto, the Principles are addressing the substance question concerning the protection of internally displaced children from recruitment or coercion to participate in military hostilities. Within the scopes of the Guiding Principles it is urged as well to take all appropriate measures to reunify the separated families especially when children are involved.

Further, states are called upon to ensure that internally displaced children, in particular, will receive a proper education with full respect of their cultural identity, religion and language and in equal manner next to other children.  

Considering the existing interest in issues of children’s forced displacement it is important to touch upon another specific legal mechanism dealing with the children's rights. Convention on the Rights of the Child (CRC) a specially dedicated legal document enduring ethical principles and international standards for better safeguard of children was adopted in 1989. As far as the question of internally displaced children is at stake, it is notable to refer to article 39 of the CRC that creates a foundation for effective assistance to the victim children of armed conflicts. It provides that „States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of .... armed conflicts“. The Convention primarily focuses on refugee children, albeit other provisions of the CRC provides a strong opportunity for assisting the internally displaced as well, inter alia, the Convention makes the states primarily responsible to exercise humanitarian assistance obligations set forth in the document.

In general, the Convention on the Rights of Child is an effective tool for international human rights monitoring and reporting and ensuring to support the governments in overall fulfilling of the obligations relating to the protection of the children rights.

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Referring back to the Guiding Principles another valuable point to mention are the principles relating to humanitarian assistance of the internally displaced. As a general rule, IDPs become vulnerable to human rights violations as a result of forced displacement and, therefore, they are in extreme necessity for proper and prompt humanitarian assistance on part of the governments concerned. Accordingly, the principles expatiates upon the undoubdful and primar responsibility of national authorities to provide assistance to internally displaced persons, followed by initiations to offer their services to support the internally displaced on behalf of international humanitarian organizations and other relevant actors. Various UN resolutions are the contribution to facilitate the work of humanitarian non-governmental organizations in that connection and to support them in realization of the right to offer humanitarian assistance to IDPs abating the view that such offers may constitute an interference in internal affairs of the states.  

According to the contents of Guiding Principles, the period of forced displacement embraces the process of return, resettlement and reintegration of internally displaced persons, that is embodied in the last section of the Principles and is given a significant place among other important safeguards provided to IDPs.

Internally displaced persons, after the elapse of the circumstances forced or obliged them to flee the places of permanent residence, are entitled to exercise their right „to return voluntarily, in safety and with dignity, to their homes ..... or to resettle voluntarily in another part of the country.“ So far the present Principles are to be employed by competent authorities and other groups of persons (insurgent groups) regardless of their...


36 „......Such an offer shall not regarded as an unfriendly act or an interference in a State’s internal affairs and shall be considered in good faith. Consent thereto shall not be arbitrarily withheld, particularly when authorities concerned are unable or unwilling to provide the required humanitarian assistance“, Principle 25 (Para. 2) of the Guiding Principles on Internal Displacement.
legal status, therefore, these actors are primarily prevented from any arbitrary approach to force IDPs to return to their homes whether or not these places are safe.

In general, forced displacement has a negative consequences which primarily addresses the property issues and enjoyment of possessions by the internally displaced persons. Hence, the governments are bound to facilitate returned and resettled displaced persons in recovery of property and possessions if such is possible after eradication of the conditions of forced displacement. Otherwise, i.e. whereas the recovery is not possible, the obligation of the state authorities are expressed in providing or assistance to IDPs in obtaining appropriate compensation or another form of just reparation.  

It has to be mentioned one more point that deservs attention, specifically, it has been urged the situation of internally displaced persons after the cessation of IDPs status. The concerns of internally displaced persons have not been touched in any of international instruments, even in the Guiding Principles on Internal Displacement.

After general summary of the Guiding Principles, it became apparent that, the document merely implicates the range of subjects that appear in terms of human rights and humanitarian law and does not refer cessation conditions.

The requirement to regulate the conditions and effects of cessation clause is defined as follows:

“A cessation clause has to be included within the definition to enable the appraisal of conditions in which protection or assistance to internally displaced persons should cease, having regard to the prevailing circumstances and the need for protection“.

Comparing U.S. Committee Refugee’s categorization of persons in Cyprus (continued IDP definition) and South Africa (cessation of IDP status for many), Cohen & Deng provided examples for determination of cessation status for IDPs. In case of Cyprus, the fact that


internally displaced persons have been resettled for over two decades and that conflict is still pendant identifies situation of IDPs as being in continued forced displacement, taking into account that „many of the displaced still wish to return home“. Although, situation in South Africa was described as different case noting, that:

„Moreover, since the end apartheid, it could be argued that the displacement of many is now a land and economics issue and that in some cases people who had never been ‘displaced’, are living in worse conditions than those who had been displaced generations ago“.39

The above findings seems to allow that the land conflicts may not be considered as one of essential roots causing the forced displacement and that the pending character of the conflict is not a factor for cessation status. Whereas, the fact remains that individuals who suffered from former regime have a fundamental right to claim redress being established under the Guiding Principles as primar obligation of the authorities concerned since the return or resettle of internally displaced persons.

Furthermore, the problem of implication of cessation status has been appeared in relation of internally displaced persons from Nicaragua and EI Salvador. The U.S. Committee for Refugee’s commented incidentally listing the following criteria:

„.... USCR considered people no longer displaced if they voluntarily returned home to live, whether the conditions that led them to flee had significantly improved or not. We also considered them no longer displaced, whether they returned home or not, when the conditions that led them to flee improved sufficiently that most observers considered that the displaced could safely return home, and when refugees from those countries repatriated from neighbouring states.“40


The arguments carry the face of being inconsistent; while trying to echo the 1951 Convention on the Status of Refugees’ cessation provisions the reference made gives rise to concern when analyzing the continuing character of IDPs status. According to Cecilia Bailliet, it is quite difficult and to some extent hopeless to make comparison between refugee’s situation and IDPs needs in terms of cessation status. For a variety of reasons refugee receive more effective support from international community, whereas, internally displaced population have in fact to wait for an adequate response by its national authority. Therefore, when it appears that coercive expulsion served as a ground for internal migration, the problem will probably remain unsettled and the internally displaced persons victimized until restitution of property or appropriate compensation is provided.\footnote{Cecilia Bailliet, Between Conflict & Consensus: Conciliating the Land Disputes in Guatemala. Supra note 19. 2002. p. 62.}

In the final analysis, the Guiding Principles considered to present a major legal tool in the international protection system for the internally displaced, as it comprises the rights of the internally displaced and the obligations of authorities and insurgent groups that have to be fulfilled on the part of the latter. Although not being a binding document the Guiding Principles has received a strong support and been widely applied at international panel. In April 1998, the Commission on Human Rights, in a unanimously adopted resolution co-sponsored by 55 states expressing a stated intention of the Representative to apply them in his work. Similarly, the UN Economic and Social Council acknowledged the Principles, and the Secretary-General stressed the importance of the document and held the Principles as one of the „notable achievements“ in the humanitarian area in 1998.\footnote{Report of the Secretary-General to the Economic and Social Council, Strengthening of the Coordination of Emergency Humanitarian Assistance of the United Nations (1998), p.3, Roberta Cohen, The Development of International Standards to Protect Internally Displaced Persons in Human Rights and Forced Displacement, eds. By Anne F. Bayefsky and Joan Fitzpatrick, supra note 5, p. 83-84.} Regional bodies have also begun to employ the Guiding Principles, among them, the Inter-American Commission on Human Rights of the Organization of American
States. In addition, international organizations, such as, UNHCR, the United Nations Children Fund (UNICEF), the World Food Program (WFP) and others started extensively to rely upon the Principles in fulfilling its missions.

Ultimately, meanwhile, the main contention is to implement the Guiding Principles in view of the non-binding nature of the document and absence of special monitoring body to overview the compliance of bounding actors with the requirements of the Principles. Hence, in achieving the goals set forth in the Guiding Principles on Internal Displacement the wide-range endeavors is required to be exercised involving UN agencies, regional organizations, international and local NGOs and the internally displaced themselves.

Finally, the Guiding Principles on Internal Displacement is a decided step forward to protect the rights and fundamental freedoms of IDPs. Although, the Guiding Principles in tandem with other regional human rights instruments, such as, the European Convention for the Protection of Human Rights and Fundamental Freedoms and the American Convention on Human Rights are supposed to be the effective legal safeguards to be applied by state actors to ensure the full compliance with the Guiding Principles itself.

Chapter 2. Fundamental Rights of Internally Displaced Persons according to the Jurisprudence of the European Court of Human Rights and the Inter-American Court of Human Rights

Among the basic rights of IDPs that are set forth in the Guiding Principles, the property rights may be in general the subject of violation. It follows from the definition of IDPs enshrined in the Guiding Principles that forced displacement is directly resulted in termination of possessions:

„….. internally displaced persons are persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, ... as a result of ...“.

To summarize, the Principle reflects both hard and soft law standards. It is designed to establish protective mechanisms to secure IDPs property rights during conflict and after its termination. However, the Principle has been critised as it does not directly enshrine a safeguard against coerced sale of property. Insofar, internally displaced persons may subject to property rights violations that is followed by claims for recognition of property right, thus the principle at stake is not considered to present an overwhelming measure for preventing forced displacement.44

The Guiding Principles contains a substantial safeguard for protection of the right to property of specific group of individuals: „States are under a particular obligation to protect against the displacement of indigenous peoples, minorities, peasants, pastoralists and other groups with a special dependency on and attachment to their lands.”45

It can be assumed that the present regulation represents an additional substantial basis for initiation of proceedings facing the violation of property rights. Furthermore, from the perspectives of humanitarian law, internally displaced persons are also authorized to take a stand against the interference with their right to property relying on the provisions that

43 „1. No one shall be arbitrarily deprived of property and possessions.
2. The property and possessions of internally displaced persons shall in all circumstances be protected, in particular, against the following acts:
   A. Pillage;
   B. Direct or indiscriminate attacks or other acts of violence,
   C. Being used to shield military operations or objectives;
   D. Being made the object of reprisal; and
   E. Being destroyed or appropriated as a form of collective punishment.
3. Property and possessions left behind by internally displaced persons should be protected against destruction and arbitrary and illegal appropriation, occupation or use.”


45 Principle 9, the Guiding Principles on Internal Displacement.
strengthen IDPs claims to property related rights set forth in international legal instruments.46

The right to freely enjoy the possessions once again after the forced displacement followed by the disappropriation is of fundamental importance for internally displaced persons. As mentioned previously, the returned and/or resettled internally displaced shall be provided with an assistance to recover their property and possessions left as a result of forced displacement.47

The substantial right for restitution of property lost for the purpose of displacement can be extracted from the term of reparation enshrined in the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of Human Rights and International Humanitarian Law, as follows:

„Restitution – should, whenever possible, restore the victim to the original situation before the violations of international human rights or humanitarian law occurred. Restitution includes: restoration of liberty, legal rights, social status, family life and citizenship; return to one’s place of residence, and restoration of employment and return of property."

The overall recognition of IDPs fundamental right to recovery the property or receive an adequate compensation has been straightway developed by the UN Sub-Commission on the Promotion and Protection of Human Rights and the UN Committee on the Elimination of Racial Discrimination.48

46 Article 147 of the IV Geneva Convention relative to Civilian Persons in Time of War prohibits destruction and appropriation of property unless it is justified by military necessity and carried out lawfully. PA II of the Geneva Conventions prohibits destruction of foodstuffs, agricultural areas, crops, livestock, drinking water installations, supplies and water works.

47 Supra note 29.

48 „All such refugees and displaced persons, have, after their return to their homes of origin, the right to have restored to them property of which they were deprived in the course of the conflict and to be compensated appropriately for any property that cannot be restored to them. Any commitments or statements relating to such property made under duress are null and void.“
Although, some definitions made in terms of „hard law“ language on restitution matters leaves less chance to internally displaced persons to make a choice in favour of one or another form of reparation, like it is clearly shown in the ILA Declaration of principles of International Law on Internally Displaced Persons; Article 9 of the Declaration provides: „Internally displaced persons shall be entitled to restitution or to adequate compensation for property losses or damages and for physical and mental suffering resulting from their forced displacement."

According to some authors, deficiency of the clear definition of the right to restitution in the human rights instruments decrease the perspective to full and adequate restoration of IDPs in their rights. Luke Lee in his paper makes reference to the extreme importance to establish such clear standard, as specified hereinafter:

„The value of recognizing a right to restitution is not only valuable for reintegrating displaced persons, but also for preventing further displacement crisis."

Striking the balance, it is notable that internally displaced persons play a passive role in defining the proper form of restitution, hence the future solution of their problems merely depends on the will of state actors.49

Incidentally, failure of state authorities to comply with the internationally recognized protection standards of IDPs may arouse the possibility to seek effective remedies before international tribunals. Adhering to this concept, Dinah Shelton pointed to importance and utility value of existing international remedy system:

„The international guarantee of a remedy implies that a wrongdoing state has the primary duty to afford redress to the victim of a violation. The role of international tribunals is subsidiary and only becomes necessary and possible when the state has failed to afford the required relief. However, the role of the international tribunal is important to the

integrity of the human rights system and victims of violations, particularly when the state deliberately and consistently denies remedies, creating a climate of impunity."\(^{50}\)

On the subject, there are strongly established international and regional mechanisms to address human rights violations often accompanying internal displacement, among them, the individual complaint system finding it available to make a state liable for various human rights breaches. Incidentally, at the regional level, the European Court of Human Rights alongside with the Inter-American Court of Human Rights considered to present a bodyguard system available for internally displaced persons in response of their claims to seek remedy for violations of property related and other fundamental rights.

\textbf{a) Analysis of the Judgments of the European Court of Human Rights}

"......European Convention on Human Rights and its additional protocols, ..... constitutes the most highly effective legal tool for the protection of IDPs in Europe, ..... which supercede any national legislation. As IDPs remain under the protection of their own country, they are entitled to the same rights as any other person. In particular, in accordance with Article 1 of the ECHR, they must be able to exercise the rights and freedoms defined in the Convention."\(^{51}\)

This message gains its assessed value in view of the growing number of internally displaced persons through the Council of Europe member-states. According to the statistical figures, eleven of 47 member-states, among them, Armenia, Azerbaijan, Bosnia & Herzegovina, Croatia, Cyprus, Georgia, Macedonia, Moldova, Russia, Serbia and Turkey have a population of nearly 2.5 million internally displaced persons. Most of these people

\(^{50}\) Ibid. P. 146.

\(^{51}\) Corien W.A. Jonker, Chair of PACE Committee on Migration, Refugees and Population, Future directions for the protection of IDPs through domestic law and legally binding regional and sub-regional instruments, at the Conference „Ten Years of Guiding Principles on Internal Displacement – Achievements and Future Challenges”, Oslo, 16 October 2008.
have left the places of habitual residences as a result of armed conflicts and, accordingly, were deprived of the right to return and to regain access to their property and possessions for almost 15 years.

The right to property is one of the fundamental rights guaranteed under the European Convention for the Protection of Human Rights and Fundamental Freedoms.52

In its first judgment in case of Loizidou v. Turkey53 concerning human rights violations in Northern Cyprus the European Court of Human Rights found respondent state responsible for violation of the property right on the land of Ms. Loizidou. According to the circumstances of the case, the applicant has been deprived of the right to peaceful enjoyment of her property in Kirenia as a result of Turkish occupation of Northern Cyprus in 1974.

The important contention in the present case was the question of responsibility of the Turkish government with regard to violations occurred on the territory of non-recognized state, „Turkish Republic of Northern Cyprus“ (TRNC) established by Turkey after its invasion on the territory at stake. Touching the question of „jurisdiction“ of the respondent state in line of Article 1 of the European Convention on Human Rights54 the ECtHR held, that:

„62. ...... Bearing in mind the object and purpose of the Convention, the responsibility of a Contracting Party may also arise when as a consequence of military action – whether lawful or unlawful – it exercises effective control of an area outside its national territory.

52 Article 1 of Protocol No. 1: „Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest to secure the payment of taxes or other contributions or penalties.“

53 Case of Loizidou v. Turkey (Preliminary Objections, application No. 15318/89) , judgment of March 23, 1995.

54 «The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of the Convention".
The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration.

63. In this connection the respondent Government have acknowledged that the applicant’s loss of control of her property stems from the occupation of the northern part of Cyprus by Turkish troops and the establishment there of the „TRNC“ .......

64. It follows that such acts are capable of falling within Turkish “jurisdiction” within the meaning of Article 1 (art. 1) of the Convention.“

Furthermore, in the second judgment as of December 18, 1996 (on merits) on the present case the ECtHR deciding on the government’s claim concerning the ratione temporis matter, identified the character of effected violation of the right to property, denial of peaceful enjoyment of the possessions as presented to be of continuing nature.55 The Court established that interference with the applicant’s property right amounted to a breach of Article 1 of Protocol No. 1. Incidentally, the Court’s findings read as follows:

„63. ... as a consequence of the fact that the applicant has been refused access to the land since 1974, she has effectively lost all control over, as well as all possibilities to use and enjoy, her property. The continuous denial of access must therefore be regarded as an interference with the rights under Article 1 of Protocol No. 1 (P1-1). Such an interference cannot, ...... regarded as either a deprivation of property or a control of use within the meaning of the first and second paragraphs of Article 1 of Protocol No. 1 (P1-1-1, P1-1-2). However, it clearly falls within the meaning of the first sentence of that provision (P1-1) as an interference with the peaceful enjoyment of possessions. In this respect the Court observes that hindrance can amount to a violation of the Convention

55 «41. The Court recalls that it has endorsed the notion of a continuing violation of the Convention and its effects as to temporal limitations of the competence of Convention organs (seem inter alia, the Papamichalopolous and other v. Greece judgment of 24 June 1993.....).

Accordingly, the present case concerns alleged violations of a continuing nature if the applicant, for purposes of Article 1 of Protocol No. 1 ...... can still be regarded – as remains to be examined by the Court – as the legal owner of the land“. Case of Loizidou v. Turkey (application no. 15318/89), judgment as of 18 December 1996.
just like a legal impediment (see, mutatis mutandis, the Airey v. Ireland judgment of 9 October 1979, Series A no. 32, p. 14, para.25)“.

Moreover, the application was submitted on alleged violation of Article 8 of the European Convention, which provides:

„1. Everyone has the right to respect for his ..... home... “

However, the Court rejected applicant’s claim with respect to breach of the right under Article 8 considering that the object of the property right was in fact land which does not fall under the scopes of the notion „home“ within the meaning of the present Article.56

In the conclusion of review of Loizidou case, reference should be made to the final outcome of the Court’s principal judgment on the merits. The Court accepted applicant’s claim on just satisfaction rule under Article 50 of the Convention for unjustified interference with property right,57 considering that „Turkey’s responsibility under the Convention in respect of the matters complained of is res judicata.“ The Court’s award composed of 300.000 cypriot pounds in pecuniary damages (about US$600.000), 20.000 cypriot pounds in non-pecuniary damages (US$40.000) as well as the applicant’s costs and expenses in full.58

Case of Cyprus v. Turkey came after the case of Loizidou. The distinguishable character between two cases is first of all the matter of procedural inadequacy, since the present case was originated in terms of inter-state application procedure, i.e. the government of Cyprus being the applicant party claimed on behalf of a large number of internally

56 Ibid. Para. 66, „Court observes that the applicant did not have her home on the land in question. In its opinion it would strain the meaning of the notion „home“ in Article 8 to extend it to comprise property on which it is planned to build a house for residential purposes. Nor can that term be interpreted to cover an area of a State where one has grown up and where the family has its roots but where one no longer lives. “

57 „If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the .... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party.“

displaced Greek Cypriots.\textsuperscript{59} Generally, the legal findings of the Court on the present case were similar to those set forth in the case of \textit{Loizidou}, in particular, referring the question of imputability of Turkey on allegations made by the applicant.

As a matter of facts, claim under Article 1 of protocol No. 1 was one of the allegations of the applicant government. Similar to the findings concerning the government’s „jurisdiction“, the Court, recalling its reasoning and conclusion given in the \textit{Loizidou} judgment (\textit{merits}), concluded that there has been violation of Article 1 of Protocol No. 1 against the Greek Cypriots being denied access to and control, use and enjoyment of their property as well as any compensation for the interference with their property rights.\textsuperscript{60}

Furthermore, the Court has extended its interpretation of the right to property with respect to the internally displaced living in Northern Cyprus in that their right to the peaceful enjoyment of their possessions was not secured in case of their permanent departure from that territory and in that, in case of death, inheritance rights of relatives living in Southern Cyprus were not recognised.\textsuperscript{61}

However, by contrast with the \textit{Loizidou} judgment (\textit{merits}), the Court found a breach of Article 8 observing that internally displaced Greek Cypriots continued to be prevented from returning to or even visiting their homes in Northern Cyprus, that constituted violation of the Convention Article protecting the right to respect to one’s home.

In addition, the Court, referring to the Cypriot government’s allegation focusing on violation of Article 13\textsuperscript{62} of the Convention, construed that:

\textsuperscript{59} „The Commission established the facts ........ that over 211,000 displaced Greek Cypriots and their children continued to be prevented as a matter of policy from returning to their homes in northern Cyprus and from having access to their property there for any purpose“. The Commission’s findings of fact in the case Cyprus v. Turkey (application no. 25781/94), 10 May, 2001, Para. 28.

\textsuperscript{60} Ibid. Para. 189.

\textsuperscript{61} Ibid. Para. 270.

\textsuperscript{62} Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.
The Court notes that in the proceedings before the Commission the respondent Government pleaded that, pending the elaboration of an agreed political solution to the overall Cyprus problem, there could be no question of a right of displaced persons to return to the homes and properties which they had left in Northern Cyprus or to lay claim to any of their immovable property ..... The respondent government did not contend before the Commission that internally displaced persons could avail themselves of local remedies to contest this policy of interference with their rights. Indeed, the Court considers that it would be at variance with the declared policy to provide for any challenge to its application. ..... The Court ..... concludes that there has been a violation of Article 13 by reason of the respondent State’s failure to provide to Greek Cypriots not residing in Northern Cyprus any remedies to contest interferences with their rights under Article 8 of the Convention and Article 1 of Protocol No. 1.”

In doing so, the Court did not complied with the applicant government’s claims under Article 14 taken in conjunction with Articles 8 and 1 of Protocol No. 1, as well as under Article 3 of the Convention.

As a result of analysis of the cases, a conclusion could be made reflecting some similiraties and to contrary discrepancies between them. First of all, in face of the victims presented in both respective cases were Greek Cypriots who have been subjected to violations of property rights alongside with other Conventional provisions. However, in Cyprus v. Turkey judgment, allegations on breach of Art. 1 of Protocol No. 1 were made by the applicant government on behalf of Turkish Cypriots as well, but the Court decided that the evidences presented before the Court were not sufficient for establishing a violation of


64 Ibid. “It considers that it is not necessary to examine whether in this case there has been a violation of Article 14 taken in conjunction with those Articles by virtue of the alleged discriminatory treatment of Greek Cypriots not residing in northern Cyprus as regards their rights to respect for their homes, to the peaceful enjoyment of their possessions and to an effective remedy. .... whether the facts alleged also give rise to a breach of Article 3 of the Convention.” Para. 199-203.
the property rights of Turkish Cypriots. Thus, the manner the Greek Cypriots were treated amounted to discrimination expressed in continued denial of having access to their possessions located on the territory of Northern Cyprus. Although, the Court did not consider it necessary to find a violation of Article 14 in the second judgment.

Furthermore, the alleged breach of the right to property may involve violation of other fundamental rights, such as the right to respect of one’s home (art. 8), or Article 13 providing the right to an effective remedy. Referring back to the examination of allegations under Article 8 by the Court, it is notable to note, that the crucial element is the object of the right to property, as far as the definition „home“ enshrined in Article 8 implicates only the house rather than a spot of land. For this reason, the Court, therefore, denied to comply with Ms. Loizidou’s claim under Article 8.

Another inference of the Court relates to the findings about interferences with property rights of internally displaced Greek Cypriots. Notwithstanding the fact, that there was not presented formal and unlawful expropriation of the property of the IDPs, but these persons because of the continuing denial of access to their property, have lost all control over, as well as possibilities to enjoy their possessions. Accordingly, the Court, addressing the existing continuing character of the interference with the right to the peaceful enjoyment of possessions, found it as falling under the scopes of the first sentence of Article 1 of Protocol No. 1.

The property rights of internally displaced persons may subject to a heavy breach as a result of unlawful action from their own government authority. A palmary example of it is the case of Dogan and others v. Turkey. As regards the general background of the case, the part of the applicants were the owners of the houses and land located in the village of Boydas, whereas other applicants cultivated the land and lived in the houses owned by

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65 Ibid. Para. 376-377.

66 Dogan and others v. Turkey (applications Nos. 8803-8811/02, 8813/02 and 8815-8819/02), judgment as of 10 November, 2004.
their fathers. Applicants used to live in peace in the home village in Hozat district until 1994. Following the violent conflict which had been going on since 1980s between the Turkish security forces and the Workers’ Party of Kurdistan (PKK) in favour of Kurdish autonomy, the applicants were forcible evicted from the village by security forces on account of the disturbances in the region. In addition, the security forces destroyed applicants’ houses and since that period prevented them from return to their village.\(^67\)

During the hearings before the ECtHR, the government of Turkey argued, whether the applicants had a title to the property on account of the absence of land registry records, and accordingly, if the property constituted „possessions“ within the meaning of Article 1 of Protocol No. 1. The Court specified that the economic resources and the revenue that the applicants derived from the property owned by them compose „possessions“ in line of Article 1 of Protocol No. 1.\(^68\)

The Court concluded that there has been a violation of Article 1 of Protocol No. 1 in the present case relied particularly upon the proportionality of the interference with the applicants’ rights to property:

„For the purposes of the first sentence of the first paragraph, the Court must determine whether a fair balance was struck between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights .......... As noted above, armed clashes, generalised violence and human rights violations, specifically within the context of the PKK insurgency, compelled the authorities to take

\(^67\) Ibid. Paras. 12-14.

\(^68\) Ibid. Para. 139: «The Court notes that it is not required to decide whether or not in the absence of title deeds the applicants have rights of property under domestic law. The question which arises under this head is whether the overall economic activities carried out by the applicants constituted „possessions“ coming within the scope of the protection afforded by Article 1 of Protocol No. 1. In this regard, the Court notes that it is undisputed that the applicants all lived in Boydas village until 1994. Although, they did not have registered property, they either had their own houses constructed on the lands of their ascendants or lived in the houses owned by their fathers and cultivated the land belonging to the latter. The Court further notes that the applicants had unchallenged rights over the common lands in the village, such as the pasture, grazing and the forest land, and that they earned their living from stockbreeding and treefelling. Accordingly, ......, all these economic resources and the revenue ...... may qualify „possessions“ for the purposes of Article 1.«
extraordinary measures to maintain security in the state of emergency region. These measures involved, ......., the restriction of access to several villages, including Boydas, ...... However, it observes that in the circumstances of the case the refusal of access to Boydas had serious and harmful effects that have hindered the applicants’ right to enjoyment of their possessions for almost ten years, during which time they have been living in other areas of the country in conditions of extreme poverty, with inadequate heating, sanitation and infrastructure...... . Their situation was compounded by a lack of financial assets, having received no compensation for deprivation of their possessions, and the need to seek employment and shelter in overcrowded cities and towns, where unemployment levels and housing facilities have been described as disastrous .... .

More importantly, the Court considered the government’s efforts taken to remedy the situation of internally displaced persons in general not sufficient and inadequate:

"... it points out that the return to village and rehabilitation project referred to by the Government has not been converted into practical steps to facilitate the return of the applicants to their village. ....... Besides, the failure of the authorities to facilitate return to Boydas, the applicants have not been provided with alternative housing or employment. Furthermore, ...... the applicants have not been supplied with any funding which would ensure an adequate standard of living or a sustainable return process. For the Court, however, the authorities have the primary duty and responsibility to establish conditions, as well as provide the means, which allow the applicants to return voluntarily, in safety and with dignity, to their homes or places of habitual residence, or to settle voluntarily in another part of the country (see, in this respect Principles 18 and 28 of the United Nations Guiding Principles on Internal Displacement......). Moreover, as regards the draft legislation on compensation for damage occurred as a result of the acts of terrorism or of measures taken against terrorism, the Court observes that this law is not yet in force and, accordingly, does not provide any remedy for the applicants’ grievances under this heading. .... the Court considers that the applicants have had to bear an individual and excessive burden which has upset the fair balance which should be struck between the
requirements of the general interest and the protection of the right to the peaceful enjoyment of one’s possessions.\textsuperscript{69}

Furthermore, similar to Loizidou and Cyprus cases the Court adjudged that refusal of access to the applicants’ homes and livelihood, in addition to a violation under Article 1 of Protocol No. 1, presented also an unjustified interference with the right to respect for family lives and homes within the meaning of Article 8 of the Convention. The Court also concluded that because of absence of available effective remedy in respect of the denial of access to the applicants’ homes and possessions in Boydas village, the respondent state was held liable for violation of Article 13 of the Convention.

In the conclusion, the Court made an important and quite extended explanation of the definition „possessions“ for the purposes of Article 1 of Protocol No. 1 by implicating in it also economic resources and the revenue obtained by the applicants as a result of cultivation of the immovable property owned by them. As the matter of fact, despite of the fact that the Court was incapable to define the exact basis of the applicants’ displacement for the non-existence of sufficient evidences and lack of an independent investigation into the alleged events, it decided to focus to the examination of the applicants’ complaints concerning the denial of access to their possessions within the scopes of the first sentence of Article 1 of Protocol No. 1. The Court considered it sufficient that applicants had no opportunity to return to their village because of the permanent refusal on the part of the authorities and, accordingly, came to a conclusion that interference with the applicants’ right to the peaceful enjoyment of their possessions was unlawful and unjustified.\textsuperscript{70}

Referring back to the cases described above, the European Court of Human Rights has ruled over the question of entitlement to just satisfaction under the Article 50 of the

\textsuperscript{69} Ibid. Paras. 153-155.

\textsuperscript{70} Ibid. Para. 143.
Convention solely in *Loizidou* judgment. Estimating the compensation to be awarded to the applicant as a pecuniary damage, the Court decided to assess the loss suffered by the applicant with reference to the annual ground rent, calculated as a percentage of the market value of the property that could have been earned for the whole period. However, the Court denied to accept the rate of percentage increases as a realistic basis for calculating the applicant’s loss and, thus, awarded her only the half of the sum she claimed for pecuniary damage. As for non-pecuniary damage, the Court based its decision on award considering that „..... the present case concerns an individual complaint related to the applicant’s personal circumstances and not the general situation of the property rights of Greek Cypriots in northern Cyprus...“, therefore, it awarded 20.000 cypriot pounds instead of 621.900 CYP.

It can be argued, whether the compensation granted to the applicant was sufficient and adequate to restore her in her right to property. In addition, controvertible is the approach of the Court in respect of the inappropriate sum for non-pecuniary damage defined based upon the considerations of the Delegate of the Commission. Contrary to the Court’s conclusion, it is notable that implication of the punitive characteristic in awarding the compensation under Article 50 is of extreme importance for the purpose of reparation and, therefore, shall be implicated in the Court’s deciding the question of just satisfaction. The award sum should not be symbolic considering that the applicant has been deprived of the right to peaceful enjoyment of her property and violation of the right to property is of continuous character.

In the end, keeping under review all these cases, it appears that forced displacement followed by violation of the right to peaceful enjoyment of possessions has been occurred

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72 Ibid. Paras. 27-33.

73 „... no punitive element should be imported into the application of Article 50 since the „public policy“ considerations adduced by the applicant concerned the global situation of displaced Greek Cypriots and thus went far beyond the perimeters of individual case.“
as a consequence of occupation of the territory of another country or internal disturbances within the territory of national state. In such situations, the Court held the occupant state to be responsible for the violation of respective Convention rights within its own „jurisdiction“ for the purposes of Article 1 of the Convention. Specifically, the respondent government failed to fulfil its negative obligation not to interfere in applicants' right to peaceful enjoyment of possessions. Although, in *Dogan and others v. Turkey* judgment, the Court made reference also to government’s failure to undertake all adequate and sufficient measures to organize applicants return to their homes that can be identified as violation of positive obligation of the state under the scopes of Article 1 of Protocol No. 1.\(^4\) Generally, it is difficult to differentiate the scopes of the State’s positive and negative obligations, in particular, under Article 1 of Protocol No. 1.\(^5\) However, the concept of positive obligations may require the State to take the measures necessary to protect the right of property that has not been met in *Dogan* case.

The case-law of the European Court of Human Rights clearly demonstrates that violation of other fundamental rights and freedoms guaranteed under the Convention has been also the subject of examination by the Court. In the cases involving armed conflict the respondent party has been held responsible for failure to protect IDPs from being abducted and killed (so called „disappearance“ cases), exposed to unfair trials, the cruel or inhuman treatment, etc.

In the *Cyprus* case the ECtHR was unable to proof that 1, 491 missing Greek Cypriots were unlawfully killed by Turkish or Turkish-Cypriots forces. However, the Court took into account the negligence of the respondent government to undertake any investigation into the allegations made by the relatives of missing persons that the latter have been

\(^4\) *Supra* note 58.

\(^5\) “... The applicable principles are nonetheless similar. Whether the case is analysed in terms of a positive duty of the State or in terms of an interference by a public authority which needs to be justified, ..... . In both contexts regard must be had to the fair balance to be struck between the competing interests of the individual and of the community as a whole.....”. *Case of Broniowski v. Poland*, (application No. 31443/96), judgment of 22 June, 2004, Para. 144.
disappeared in the life-threatening circumstances. Therefore, it was established that Turkish authorities failed to meet the standards of an effective investigation under Article 2 of the Convention and, thus the Court found a continuing violation of this provision on account of the authorities’ gross carelessnes to conduct an effective investigation to clarify the whereabouts and fate of missing Greek Cypriots disappeared at life-threatening circumstances.

It is worthy to note, that the relatives of missing persons claimed violation of Article 3 of the Convention as well for the ommission of state authorities to properly investigate the disappearance of Greek Cypriots, which was upheld by the Court for the following considerations:

“... question whether a family members of a ‘disappeared person’ is a victim of treatment contrary to Article 3 will depend on the existence of special factors which give the suffering of the person concerned a dimension and character distinct from the emotional distress which may be regarded as inevitably caused to relatives of a victim of a serious human-rights violation. Relevant elements will include the proximity of the family tie – in that context, a certain weight will attach to the parent-child bond -, the particular circumstances of the relationship, the extent to which the family member witnessed the events in question, the involvement of the family member in the attempts to obtain information about the disappeared person and the way in which the authorities responded

76 See, the Cyprus case, „131. For the Court, the applicant Government’s allegations must, however, be examined in the context of a Contracting State’s procedural obligation under Article 2 to protect the right to life. It recalls in this connection that the obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the State’s general duty under Article 1 to ‘to secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention’, requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by agents of the State .... or by non-State agents.”

77 Case of Cyprus v. Turkey, Paras. 131-136.

78 Article 3 (Prohibition of Torture) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, „No one shall be subjected to torture or to inhuman or degrading treatment or punishment”.
to those enquiries. .... the essence of such a violation does not so much lie in the fact of the ‘disappearance’ of the family member but rather in the authorities’ reactions and attitudes to the situation when it is brought to their attention. It is especially in respect of the latter that a relative may claim directly to be a victim of the authorities’ conduct.

In the light of afore-cited disappearance cases, the ECtHR reiterates its position in the following judgments concerning the missing persons on the territory of the Chechen Republic from a perspective of the two-phase armed conflicts. Over 100 cases have been examined by the Court on severe human rights violations of Chechen IDPs including those concerning the disappearances of people as a result of so called „sweeping operations“ in Chechnya. In the case Lyanova and Aliyeva v. Russia the Court found the disappearance of the applicants’ relatives, Murad Lyanov and Islam Dombayev attributable to the Russian authorities both for the purposes of negative obligation of the State to protect the right to life and under the procedural guarantees enshrined in Article 2 of the Convention. Further, the Court settled upon the applicants’ claim under Article 3 concluding that the Russian authorities gave no adequate response to the enquiries of

79 *Cyprus* case, Para. 156.

80 First Chechen War fought from December 1994 to August 1996 and the second Chechnia war known as the War in the North Caucasus was effected in 1999-2009.

81 Case of Lyanova and Aliyeva v. Russia (Applications Nos. 12713/02 and 28440/03) as of 16/04/2009.

82 *Lyanova and Aliyeva v. Russia*, ¶94. Having regard to the previous cases concerning disappearances of people in Chechnya which have come before the Court (see, for example, Imakayeva, ......, and Luluyev and others v. Russia .......), the Court considers that, in the context of the conflict in the Chechen Republic, when a person is detained by unidentified servicemen without “any subsequent acknowledgement of the detention, this can be regarded as life-threatening. The absence of Islam Dombayev and Murad Lyanov or any news of them for over eight years corroborates this assumption. Furthermore, the Government have failed to provide any explanation of their disappearance and the official investigation into their abduction, dragging on for 8 years, has produced no tangible results.

95 Accordingly, the Court finds that the evidence available permits it to establish to the requisite standard of proof that in the night of 28-29 June 2000 Islam Dombayev and Murad Lyanov were apprehended by State servicemen and that they must be presumed dead following their unacknowledged detention.

.....109. Authorities’ mistake to carry out an effective criminal investigation into the circumstances surrounding the disappearance of Murad Lyanov and Islam Dombayev, is in breach of Article 2 in its procedural aspect.”
the relatives of disappeared persons; thereby, inability to find out what happened to their sons provoked suffer, anguish and distress in the applicants. According to the Court’s practice, person’s illegal apprehension resulted in his/her disappearance has been largely an issue within the meaning of Article 5 of the Convention. Likewise, in the present case, the Court concluded that applicants’ sons detention had no basis in national law, had not been in accordance with a procedure prescribed by law without any formal record and finally had not satisfied any of the conditions set out in Article 5:

„...Their detention was not acknowledged, was not logged in any custody records and there exists no official trace of their subsequent whereabouts or fate. In accordance with the Court’s practice, this fact in itself must be considered a most serious failing, since it enables those responsible for an act of deprivation of liberty to conceal their involvement in a crime, to cover their tracks and to escape accountability for the fate of a detainee. Furthermore, the absence of detention records, noting such matters as the date, time and location of detention and the name of the detainee as well as the reasons for the detention

83 Lyanova and Aliyeva v. Russia, Para. 117: „... the applicants are mothers of the individuals who have disappeared. For more than eight years they have not had any news of them. During this period the applicants have applied to various official bodies with enquiries about their sons, both in writing and in person. Despite their attempts, the applicants have never received any plausible explanation or information as to what became of their sons following their detention. The responses received by the applicants mostly denied that the State was responsible for their disappearance or simply informed them that an investigation was ongoing. The Court’s findings under the procedural aspect of Article 2 are also of direct relevence here.“

84 „1. Everyone has the right to liberty and security of person. .......
2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.
3. Everyone arrested or detained ..... shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation."
and the name of the person effecting it, must be seen as incompatible with the very purpose of Article 5 of the Convention."\(^85\)

In the final analysis, the applicants in the *disappearance cases* are mostly close relatives of those, disappeared at the hands of state agents or unacknowledged persons, who claim that the authorities are responsible for the disappearance and killings of their family members in the view of the fact that during the long period of time their whereabouts have not been established. The European Court’s approach as regards the responsibility of the Member-State’s authorities is in general unanimous, in particular, when the fundamental guarantees under Article 2, 3 and 5 are at stake, which enshrine „the basic values of the democratic societies making up the Council of Europe“.\(^86\) Subsequently, the Court identifies a number of crucial elements which shall be taken into account when concluding if a person can be presumed dead, such as, unacknowledged detention which can be reasonably regarded as life-threatening for a detained person, absence of any news and information concerning the whereabouts of that person, in addition, failure of authorized officials to conduct an effective, thorough and prompt investigation into the alleged killing of a person. These factors altogether are convincible for the Court to draw an inference on grave violation of Conventional rights and freedoms.

Respectively the claims for just satisfaction, it is arguable whether the amounts granted for pecuniary or non-pecuniary damages by the Court for sufferings caused by the lost of family members are reasonable and constitute an appropriate compensation. The Court is sufficiently exact in defining the sum either for pecuniary or non-pecuniary damages which depends on „the degree of relationship between the applicants and the disappeared men and mindful of previous awards made in comparable cases“\(^87\). Particularly, the compensation for non-pecuniary damage can be estimated in a symbolic sum, thus, in

\(^85\) see, Para. 124.

\(^86\) Case of Bazorkina v. Russia (Application No. 69481/01), 11/12/2006, Para. 103.

\(^87\) See, case Utsayeva and others v. Russia (Application No. 29133/03), 01/12/2008, Para. 222.
In the case of *Utsayeva and others v. Russia*, the second applicant, mother of the disappeared person was granted EUR 5,000 for distress suffered for the killing of her son. Although, for instance, in *Imakayeva v. Russia* the applicant was awarded the sum of EUR 70,000 in relation to the emotional anguish endured by her on account of unacknowledged detention and presumed death of her son and husband.\(^{88}\) Accordingly, Court’s relation towards compensation is controversial and often is not equitable in cases with nearly similar circumstances.

Once again, case of *Cyprus v. Turkey* is rather important from the standpoint of describing the living conditions of Greek Cypriots after their return in Northern Cyprus. In other words, the Court refers to different concerns of Greek Cypriots who continued to live in Northern Cyprus having examined the allegations made by the applicant Government concerning the violation of the right to have access to education, freedom to get an information and the freedom from degrading treatment, in particular. The Court found violation of the freedom to receive and impart information protected under Article 10\(^ {89}\) of the Convention on the ground of arbitrary actions of the authorities to censor or reject the school-books designed for Greek-Cypriot population regardless of their neutral content not to pose a risk to inter-communal relations.\(^ {90}\)

The brutal effects of any armed conflict may expressed in the fact of prohibition to have access to proper education facilities and, thus internally displaced children or returnees often face problems with exercising their right to education which composes a substantial barrier for reintegration of IDPs. In the present case the question under Article 2 of

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89 Article 10 (freedom of expression), „1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. .....“.

90 Case of *Cyprus*, Paras. 252-254.
Protocol No. 1\textsuperscript{91} was raised due to the \textit{de facto} authorities’ failure to provide adequate educational facilities to Greek Cypriots living in Northern Cyprus in secondary-schools, namely, giving them an opportunity to be educated in Greek-language including a medium level as well.\textsuperscript{92} The Court further observed the United Nations Secretary-General progress report of 10 December 1995 on the „Karpas Brief“ which proved that Karpas Greek Cypriots have been exposed to severe restrictions abridging their basic freedoms. Specifically, Karpas Greek Cypriots were unable to exercise the right to bequeath immovable property to relatives living outside the Northern Cyprus, had no access to educational institutions in North due to the lack of secondary-school facilities and, finally, the children who attended secondary schools in the South were not allowed to reside in the North upon the age of 16 in the case of males and 18 in the case of females. These reasons were sufficient for the Court to find that interferences towards Karpas Greek Cypriots were caused by very reason that they belonged to other ethnic group, race and religious community, thus in the Court’s view, the authorities’ discriminatory treatment amounted to degrading treatment within the meaning of Article 3 of the Convention.\textsuperscript{93} Moreover, the authorities of Northern Cyprus introduced a practice of administering the justice through military courts which, as a matter of law, were authorized to accuse civilians in military offences. The Court had no reason to doubt about the impartiality and independence of the military courts by virtue of the fact that there was close structural link between the executive power and the military officials ruling in the name

\textsuperscript{91} Article 2 of Protocol No. 1 of the Convention (right to education), „No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions. “

\textsuperscript{92} „...The authorities must no doubt be aware that it is the wish of Greek-Cypriot parents that the schooling of their children be completed through the medium of the Greek language. Having assumed responsibility for the provision of Greek-language primary schooling, the failure of the „TRNC“ authorities to make continuing provision for it at the secondary-school level must considered in effect to be a denial of the substance of the right at issue.“ \textit{Cyprus} case, Para. 278.

\textsuperscript{93} Case of \textit{Cyprus}, Paras. 307-311.
of military courts, which was a valid ground for the Court to consider a breach of the right to a fair trial protected by Article 6 of the Convention.\textsuperscript{94} In line of the forgoing, the competent authorities omitted to fulfil its primary obligation to facilitate the reintegration of Karpas Greek Cypriots, in safety and dignity, and with full equality in the North Cyprus.

The process of integration can be met with permanent difficulties for internally displaced persons belonging to ethnic minority group who are, therefore, persecuted by other ethnic population and subjected to severe human rights abuse. When this occurs, the persecuted individuals have no other chance than leave the national state and request the asylum in other state. In case \textit{Salah Sheekh v. The Netherlands}\textsuperscript{95} the applicant, representative of Ashraf minority group in Somalia was persecuted for several years by ruling Abgal clan who were controlling the place where applicant’s family fled to live.

Various international materials submitted before the Court described the severity of the situation in Somalia. Namely, according to Professor K. Menkhaus, „.....while the chronic and widespread level of underdevelopment and insecurity in Somalia – especially south-central Somalia – places a large portion of the population at risk, some sections of the population are especially vulnerable to human rights abuses. ... these groups are IDPs and members of minorities and weak clans.... members of politically weak clans – minority groups, low status clans, and clans residing in areas where they are badly outnumbered or outganned – are not able to call upon their clan for protection, and hence are vulnerable to predatory or abusive acts by criminals and militia with little hope of protection by the law. A report on human rights abuses by the Mogadishu-based Isma’il Jimale Human

\textsuperscript{94} Article 6 of the Convention (Right to a Fair Trial), „1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. ....“.  

\textsuperscript{95} case of Salah Sheekh v. The Netherlands (Aplication No. 1948/04), 23/05/2007, Section A.
Rights Centre in 2003 concludes that most of the victims were from minority groups ‘who have no clan affiliations as protection’.96

The circumstances mentioned above served as the reason for the applicant to seek refuge in the Netherlands. Although, Netherlands’ authorities decided to expel applicant to Somalia, which was contended in the application under Article 3 of the Convention. The Court, on the basis of the applicant’s account and the information about the situation in Somalia, considered that on his return the applicant would be exposed to ill-treatment in breach of Article 3.97

Analysis of the judgment makes it evident, that the only chance to survive for the Somalian IDPs belonging to a minority group was the affiliation to a powerful clan, otherwise, they have a marginal, isolated position in the society and most likely would become the victims of crime.

The foregoing considerations are sufficient to realize what may minimize the chance of IDPs, the members of minority groups and returnees from exile of proper integration in the national State. As a result of persecution and/or deprivation of basic human rights guaranteed by the Convention these persons became the most vulnerable group whose claims to government’s protection is generally met with no due consideration and attention. For these reasons, most of them see the occasion to survival in escape to other safe countries.

b) Analysis of the Judgments of the Inter-American Court of Human Rights

Regional legal safeguard, such as, the American Convention on Human Rights just as the precedents of the Inter-American Court of Human Rights provide a substantial protection for Internally displaced persons.


97 See, Paras. 146-149.
The Inter-American Court of Human Rights examined the cases of indigenous communities subjected to forced displacement and, as a result, prevented from voluntarily returning to live in their traditional lands in violation of their property rights under the American Convention.\textsuperscript{98} For that matter, case of \textit{Moiwana Community v. Suriname}\textsuperscript{99} rouses an interest to be discussed. The picture of the events involved in the forced displacement of Moiwana community members from their home village is the following:

“....On November 29, 1986, members of the armed forces of Suriname attacked the N’djuka Maroon village of Moiwana. State agents allegedly massacred over 40 men, women and children, and razed the village to the ground. Those who escaped the attack supposedly fled into ...... exile or internal displacement. Furthermore, as of the date of the application, there allegedly had not been an adequate investigation of the massacre, no one had been prosecuted or punished and the survivors remained displaced from their lands; in consequence, they have been supposedly unable to return to their traditional way of life.”\textsuperscript{100}

In the present case, it is important, first, to refer to the Court’s findings with respect to recognition of property rights of Moiwana community. In its judgment, the Court considered Moiwana community members to be the legitimate owners of their traditional lands and that they are entitled to use and enjoy that territory:

“.... in the case of indigenous communities who have occupied their ancestral lands in accordance with customary practices – yet who lack real title to the property – mere possession of the land should suffice to obtain official recognition of their communal that bind indigenous communities to their ancestral territory. The relationship of an

\textsuperscript{98} Article 21 of the American Convention on Human Rights, „1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of a society. 2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.”

\textsuperscript{99} Case of Moiwana Community v. Suriname, judgment of 15 June, 2005 (\textit{Preliminary objections, Merits, Reparations and Costs}).

\textsuperscript{100} Ibid. Para. 3.
indigenous community with its land must be recognized and understood as the fundamental basis of its culture, spiritual life, integrity, and economic survival. For such peoples, their communal nexus with the ancestral territory is not merely a matter of possessions and production, but rather consists in material and spiritual elements that must be fully integrated and enjoyed by the community, so that it may preserve its cultural legacy and pass it on to future generations."101 For these reasons, the Court determined that Suriname violated the right of the Moiwana community to the communal use and enjoyment of their traditional property in relation to Article 1 (1) of the American Convention, which sets up the State’s general obligation to respect rights.

Complementary to the above conclusions, the Court held the respondent State liable for violation of Article 5(1)102 concluding that Moiwana community members have endured significant emotional, psychological, spiritual and economic hardship for their separation from the traditional lands just as for the lack of a serious and thorough investigation into the events of November 29, 1986. Therefore, a long-standing absence of effective legal remedies at national level in terms of a clear evidence of the State’s responsibility in the matter constituted a substantial source of suffering and anguish for victims and their family members and obstructed them from obtaining justice. In addition, the Court has also regard to the inability of Moiwana community members to honor properly and in a traditional way their deceased loved ones.103

Finally, the Court, on the basis of the UN Guiding Principles that provide liberty to movement to IDPs and prohibit the forced displacement established a breach of Article 22104 of the American Convention:

101 Ibid. Para. 131.

102 "...Every person has the right to have his physical, mental, and moral integrity respected....“.

103 Case of Moiwana Community v. Suriname, Paras. 98-100.

104 "1. Every person lawfully in the territory of a State Party has the right to move about in it, and to reside in it subject to the provisions of the law. 2. Every person has the right to leave any country, including his own. .....“.
Thus, the State has failed to both establish conditions, as well as provide the means, that would allow the Moiwana community members to return voluntarily, in safety and with dignity, to their traditional lands, in relation to which they have special dependency and attachment - ....... – Suriname has failed to ensure the rights of the Moiwana survivors to move freely within the State and to choose their place of residence.”

With respect to restriction on free movement, it has to be mentioned, that Moiwana community members faced a real risk of being persecuted in case of return to ancestral lands. Further, there were no effective domestic remedies allowing them to return from involuntary exile in safety, thus, it was attributable to Suriname authorities to ensure to the displaced persons to remain in, return to and reside in its own country.

In the case in question the Court has reiterated the importance of procedural obligations of the Member-State to investigate and punish perpetrators of human rights violations in order to secure an effective protection of the rights found in the American Convention, “... Figuring prominently among said principles, pacta sunt servanda requires that a treaty’s provisions be given meaningful effect within a State Parties’ internal legal framework.”

As a compensation, the Court awarded to each of the victims of the above violations indemnity for material damages US$3 000.00 and for moral damages - US$10,000.00.

Although, in the instant case, a vital interest deserves the Court’s decision on other forms of reparation obliging the respondent State to ensure additional satisfaction measures and non-repetition guarantees. Specifically, the Court called Suriname for effective and swift investigation and judicial process, leading to the clarification of the violations, as well as adoption of legislative, administrative and other measures to ensure the property rights of

105 Case of Moiwana Community v. Suriname, judgment of 15 June, 2005 (Preliminary objections, Merits, Reparations and Costs). Supra note 65, Para. 120.


107 Case of Moiwana Community, Paras. 167-168.
the community members and provide for their use and enjoyment of those territories, including the creation of an effective mechanism for the delimitation, demarcation and titling of the traditional lands. Lastly, Court ruled that Suriname shall form a developmental fund, to consist of US $1,200,000, which will be directed, in particular, to solve the housing problems of Moiwana community members, and, bound the State publicly recognize its international responsibility for the facts of the instant case and issue an apology to the victims. \(^{108}\)

*Case of Plan de Sanchez Massacre v. Guatemala\(^{109}\) referred to the events of genocide and forced displacement of the community members of Plan de Sanchez following the massacre conducted by the Guatemala armed forces in July, 1982. In this case, the State has acknowledged its international responsibility for the violations occurred against the minority population of Guatemala, which, according to the Court’s conclusion, was “a positive contribution to the development of this proceeding and to the effectiveness of the principles behind the American Convention on Human Rights”.

Addressing the fact of genocide in *Plan de Sanchez case*, it is worth to mention that, the present case casts light on application of International Criminal Law by the Inter-American Court when examining violations of the American Convention. Although, the facts of genocide against members of *Maya-Ixil, Maya-Achi, Maya-k’iche, Maya-Chuj and Maya-q’anjob’al* peoples was claimed by the relatives of the victims as well as by the Inter-American Commission on Human Rights, *albeit* the Court had no authority to determine the International responsibility of Guatemala in view of its restricted power to examine only violations of the American Convention and in terms of other instruments available under Inter-American System for the protection of human rights. Therefore, the Court has limited itself by including the question of State’s international responsibility when considering on reparations:

\(^{108}\) Ibid. Paras. 209-211, 214-216.

facts such as those stated, which gravely affected the members of the Maya Achi people in their identity and values and that took place within a pattern of massacres, constitute an aggravated impact that entails international responsibility of the State, which this Court will take into account when decides on reparations. In addition, the lack of competence of the Inter-American Court to deal with violations under the Convention on the Prevention and Punishment of the Crime of Genocide was underlined in the separate opinion of judge Cançado-Trindade. In particular, he differs from each other the jurisdictional and the substantive issue of the State’s international responsibility, consequently, regardless of the absence of the Court’s authority *ratione materiae* the international responsibility of the defendant State may still arise for violating the provisions of the American Convention and other human rights instruments of which Guatemala is a party.\(^{110}\)

In the judgment on reparations and costs, the Court took into consideration the dispossession of property of the victims in determining the damage for material and non-pecuniary purposes.\(^{111}\) In addition, the Court considered that the State is obliged to undertake other form of reparation as follows:

„The State must guarantee that the domestic proceedings to investigate, prosecute and punish those responsible for the facts will be effective. ... It must also abstain from using ... amnesty and prescription, and establishment of measures designed to exclude responsibility, or measures intended to prevent criminal prosecution...“. The State was also called upon to organize a public act acknowledging its responsibility for the events took place in the instant case, which had to be held in the village of Plan de Sanchez, in

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\(^{111}\) „As a result of the armed conflict, the conditions of physical existence of the indigenous communities were affected, in the context of an acute and institutionalized indigenous poverty in rural areas and the lack of laws and social policies that protected and granted land to the indigenous communities. This translated into financial shortages of different types, the impossibility of acceding to resources for subsistence, dispossession or forced abandonment of land, and habitat deterioration, among other damage. .....“. Report of Historical Clarification Commission, „Guatemala, memoria del silencio,“ of June 1999.
the presence of state officials, and, in particular, in the presence of the members of the
community. The Court has also considered that the State must provide housing
programme for the benefit of those victims who lost their homes as a result of massacre as
well as to implement development programmes in different areas of public needs.\footnote{112}
Drawing the conclusion, it is of importance that in the previous case the Court noticed
despite that the forcible expulsion of the community from its traditional lands and
territory took place in November 1986, prior to Suriname’s accession to the American
Convention and acceptance of the Court’s jurisdiction, as a matter of fact and law, the
violation of Article 21 is of a continuing nature.\footnote{113} Generally, continuing violations are
common in cases where indigenous and tribal peoples have been forcibly removed from
their traditional lands.

In addition, the common characteristics of similar cases are expressed in the Court’s
opinion regarding the nature and the scopes of the right to property of community
members.\footnote{114} In a number of cases, the Court has also stressed the obligation of the State to
fulfil its positive obligation to recognize as a matter of law and to respect property rights
of minority tribal groups derived from the respective Convention provisions.\footnote{115} The Court


\footnote{113} See, chapter XI, \textit{supra} note 70.

\footnote{114} “... the Moiwana community members, ...., possess an „all-encompassing relationship“ to their traditional
lands, and their concept of ownership regarding that territory is not centered on the individual, but rather
on the community as a whole......”, \textit{Supra} note 70, Para. 133. See, also Case of the Mayagna (Sumo) Awas
Tingni Community v. Nicaragua, Para. 149; case of the Indigenous Community Sawhoyamaxa v. Paraguay,
Merits, Reparations and Costs. Judgment of March 29, 2006. Series C No. 146, paras. 118-121, and 131; Case
2005 Series C No. 125, paras. 124, 131, 135-137 and 154.

\footnote{115} “... the Court thus concludes that the members of the Saramaka people make up a tribal community
protected by international human rights law that secures the right to the communal territory they have
traditionally used and occupied, derived from their longstanding use and occupation of the land and
resources necessary for their physical and cultural survival, and that the State has an obligation to adopt
special measures to recognize, respect, protect and guarantee the communal property right of the members
of the Saramaka community to said territory. “ Case of the Saramaka People v. Suriname, judgment as of
November 28, 2007 (preliminary objections, Merits, Reparations and Costs), para. 96.
explicit approach regarding the State’s positive obligation in terms of the protection of the community’s property rights was underlined in the landmark case of *Mayagna Awas Tingni Community*, which reads as follows:

„As a result of the violations of the right to property and judicial protection under Articles 21 and 25 of the American Convention, the Court ordered that Nicaragua adopt legislative, administrative, and other measures that create an „effective mechanism for the delimitation, demarcation and titling of the property of indigenous communities ..... Most importantly, Nicaragua was ordered to delimit, demarcate, and title Awas Tingni’s lands „with full participation by the community“.“

As it appears from the jurisprudence of the Inter-American Court, these cases have made an important contribution to set up the strong guarantees for the protection of fundamental rights of indigenous people. In particular, it supported the development of the new interpretation of the property under international human rights law in view of community property rights, allowed victims of human rights abuses to have other types of reparation, such as, prompt and effective investigation into the massacres and forced displacement of indigenous population, thereby provoking their return to ancestral lands with dignity and in full safety.

c) Similarities and Differences

Make an allusion to the jurisprudence of the European Court of Human Rights mentioned previously, it is of concern that the Greek Cypriots demand to absolute restoration of the fundamental principle of respect for human rights is the only way to solve the issue of displaced persons’ property claims and their return to ‘the ancestral lands’. It may assumed that it is a matter that goes even beyond individual rights and somehow concerns collective rights as well; in other words, the question directly relates to ‘the right of

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Cypriot Hellenism to the ancestral lands. Addressing the dispute of property ownership in Cyprus, the victims are the persons, or descendants of persons, who have been displaced and/or dispossessed of their properties following the military clashes of 1963-64s or the subsequent de facto division of Cyprus in 1974.

As regards the indigenous population within the Latin America countries and in terms of afore-cited cases, among them, Saramaka people, whose ancestors were African slaves forcibly taken to Suriname during the European colonization in the 17th century, have established autonomous communities. The land traditionally occupied by these people is considered to be merely the necessary source for the continuation of the life and their cultural identity. In different periods, the communities have been forced to flee from their territories as a result of internal clashes or the unlawful and arbitrary economic policy of the national States.

It is noteworthy to note, that both regional Courts considering the applications on alleged violations of property rights of internal displaced individuals or communities, came to the conclusion that the violations occurred are of a continuing character regardless of the acceptance by the respondent States to the respective human rights instruments. Secondly, the High Contracting Parties were held to be liable for direct and arbitrary interference with the applicants’ rights to enjoyment to their possessions due to the forced displacement in view of the State’s negative obligations derived from Convention Articles; However, the States were judged being failed to take appropriate measures to ensure the overall protection of IDPs property rights, in the sense of administrative and legislative measures.

Furthermore, another important distinguishing character is in interpretations of the right to property and its nature. The ECtHR in Dogan and others judgment established the wide notion of possessions implying, „... the notion ‘possessions’ ... in Article 1 has an autonomous meaning which is certainly not limited to ownership of physical goods;“

certain other rights and interests constituting assets can also be regarded as ‘property rights’, and thus as ‘possessions’ for the purposes of this provision”.\(^\text{118}\)

The Inter-American Court of Human Rights defined the general notion of the property, according to which, „’Property’ can be defined as those material things which can be possessed, as well as any right which may be part of a person’s patrimony; that concept includes all movables and immovables, corporeal and incorporeal elements and any other intangible object capable of having value”.\(^\text{119}\) Although, the Court in the same judgment has extended the concept of the property since it referred the deflection of the property rights of indigenous communities.\(^\text{120}\)

Bearing in mind the differences between the approaches of the Courts, the significant controversy seems to be the question of the respondent State’s responsibility under the Convention in respect of the violations, which was the subject within the considerations concerning the „jurisdiction“ issue by the European Court of Human Rights in Loizidou and Cyprus cases.\(^\text{121}\)

At least, there is a quite clear difference in addressing the just satisfaction concept as well among the established jurisprudence of the Courts. As it was mentioned above while analyzing the afore-cited cases, the ECtHR in its judgment on just satisfaction rules over the pecuniary or nonpecuniary damages, as well as costs and expenses incurred by applicant. Although, the Inter-American Court of Human Rights devotes its judgments ruling over other forms of reparation to the victims, such as, the measures of satisfaction and guarantees for non-repetition. Article 63 (1) of the American Convention establishes that:

\(^\text{118}\) Dogan and others v. Turkey, \(\textit{supra}\) note 55, para. 138.

\(^\text{119}\) Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua, \(\textit{supra}\) note 76, Para. 144.

\(^\text{120}\) “…Among indigenous peoples there is a communitarian tradition regarding a communal form of collective property of the land, in the sense that ownership of the land is not centered on an individual but rather on the group and its community.” \(\textit{Supra}\) note 76, para. 149.

\(^\text{121}\) See, Loizidou judgment (merits), para. 56. \(\textit{Supra}\) note 60.
“If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.”

One may assume, that the definition of the American Convention gives broader opportunity to overwhelming reparation of the victims suffered due to the State’s brutal actions, in comparison with the similar provision set forth in the European Convention on Human Rights. In addition, the practice of the Inter-American Court seems to be an evident proof in this approach. However, the injured party may face difficulties in the process of implementation of the Court’s judgment in the sense a demand on full reparation to be met. On this matter, the question arises whether the American System of human rights protection effectively guarantees the prompt and adequate enforcement of the Court’s judgments. It is notable, in order to clarify specific conclusions of the Court in respect of indigenous peoples’s property rights, the Court gave a broader interpretation to its judgments, like it held in Moiwana community judgment. Similarly, the delays have been occurred at a stage of execution of the ECtHR judgments, an

122 Case of Moiwana Community v. Suriname, supra note 65, paras. 201-218.

123 Prospects and Challenges in the Implementation of Indigenous Peoples’ Human Rights in International Law: Lessons from the Case of Awas Tingni v. Nicaragua, „The period following the Inter-American Court’s 2001 decision has proven to be difficult ....... In general terms, as of January 2008, Nicaragua has complied with the monetary reparations ordered by the Court as well as the order to enact a specific administrative and legal measure to demarcate indigenous lands, although the effectiveness of the latter has been subject to question.“ supra note 78.

124 Ibid. „Under the American Convention, the Court can report those cases that have not been complied with to the OAS General Assembly and make ‘pertinent recommendations’ regarding those cases. There is no clear procedure outlining what actions the General Assembly would take to supervise compliance with Court judgments”.

125 Ibid. „... the Court stated that Suriname’s determination of the boundaries for the lands it would title for Moiwana must be done with the ‘participation and informed consent’ of the Moiwana villagers as well as of those neighbouring communities although still leaving ‘the designation of the territorial boundaries in question to ‘an effective mechanism’ of the State’s design”.

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example of it is the Loizidou judgment. Turkey complied with the Court’s decision to pay to the applicant a Court-ordered compensation only after five years, in December 2003.

**Conclusion**

„The need to restore normal patterns of life, and to ensure the economic survival and social well-being of displaced persons, and to reconstruct civil society amongst internally displaced persons is a matter of urgency for the affected States. Where it is beyond the capacity of the distressed States to put such measures in place, the international legal system should provide a method of response to assist such States on the basis of the principles of international cooperation following agreed criteria.“\(^{126}\)

The aim of the study was to get more clarification to the system of individual complaint in the hand of the victims of forced displacement claiming their rights to remedy, property restitution as well as other forms of reparation. In achieving its major goal an attempt was made to touch the issues describing the protection guarantees for internally displaced persons or merely to reveal those protection gaps regarding the root causes to many internal displacement situations linked to grave human rights violations.

Analysis of the jurisprudence of the European Court of Human Rights and the Inter-American Court of Human Rights has disclosed some differences between the approaches of the Courts in addressing the concerns of internally displaced individuals and other marginalized groups suffered from forced displacement. Specifically, it was discussed the legal solution of recognizing a foreign State’s responsibility for violations of IDPs universally recognized rights in parallel to Inter-American human rights system dealing with indigenous peoples’ communal forms of property ownership, their customary land tenure practices, and their control over their natural resources, and the consequences of encroachment of those rights. Basically, the case study has shown that people may

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\(^{126}\) Chaloka beyani, „Internally Displaced Persons in International Law“, 20 (copy is in UNHCR, CDR, July 1995).
became victims of a coercive displacement and of an assault on their rights by virtue of armed conflicts and/or as a result of arbitrary deprivation of their property rights involved in dispossession. Nevertheless, the Courts arrive to the solution following an almost identical ways in the sense of identifying the character of violations occurred and by adjusting the States’ pri-eminent obligations undertaken in the scopes of the Conventions.

In the conclusion, in pursuing their own aims, the IDPs, in general, apply internationally enforceable measures described above with the purpose to restore their rights. The expectation is that the Court would confirm State’s liability, uphold victims rights to return to their homes in safety and dignity. However, the European Court’s case-law is limited to cover only the compensation issues, whereas, according to the Inter-American Court’s judgments, they encompass broadly other measures of reparations, including, return of internally displaced persons to their homes and to give them an opportunity to repossess. The reason for such different solutions may be seen in the causes of forced displacement and the parties engaged in the events, in this context, the situation in Cyprus makes a clearance that the process of return of IDPs to their properties will require overwhelming efforts. Hence, the settlement of the crisis exclusively and as a matter of fact depends on the developments in the policies of the States concerned and on the active role of an international community.
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